A

YEE WEN CHIN

v.

PP & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CRIMINAL APPEAL NOS: W-05-42-2006 & W-05-85-2003]

C

23 JULY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 39B(1)(a) and 12(2) - Trafficking in dangerous drugs - Possession of dangerous drugs - Prima facie case - Inference of possession - Amendment of charge*

D

- Defence - Admissibility of evidence - Principles of sentencing

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Trafficking in dangerous drugs - Whether prima facie case made out - Whether charge ought to be amended to one of possession*

E

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Prima facie inference of possession - Whether repelled - Whether accused ought to have been acquitted at close of prosecution's case*

EVIDENCE: *Credibility - Weight to be given to opinion of trial judge*

F

- Defence of accused - Finding of fact - Whether defence properly evaluated

EVIDENCE: *Admissibility - Information - Evidence that another person could be guilty of offence accused charged with - Prejudicial effect -*

G

Whether hearsay - Breach of rules of natural justice - Whether substantial miscarriage of justice occasioned - Dangerous Drugs Act 1952, s. 40

CRIMINAL PROCEDURE: *Defence - Evidence - Information that another person could be guilty of offence accused charged with - Admissibility - Prejudicial effect - Whether hearsay - Breach of rules of*

H

natural justice - Whether substantial miscarriage of justice occasioned - Dangerous Drugs Act 1952, s. 40

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Dangerous drugs, possession of - Concurrent or consecutive - Different*

I

nature of drugs

One Chief Inspector Roslan Hussin ('PW5'), acting on information received, took a team of police officers to an apartment block at Taman Miharja. The police personnel took their position near a parking lot and after about 30 minutes, PW5 saw the accused emerge from the apartment block. The accused headed towards a motorcar, later proven to belong to him, carrying a red plastic bag ('exh. P15') in his left hand. He got into the car and at this juncture, PW5 and his team apprehended the accused and searched the car. They recovered exh. P15, and found two packages inside exh. P15 containing dangerous drugs. The accused was subsequently charged and tried for two offences: first, for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'); and second, for being in possession of dangerous drugs under s. 12(2) of the Act, punishable under s. 39A(1) of the Act. At the close of the prosecution's case, the trial judge held that a *prima facie* case of trafficking had not been made out on the first charge. He accordingly reduced the first charge to one of possession and called upon the accused to make his defence to both charges. At the conclusion of the whole case, the accused was convicted and sentenced to 13 years imprisonment in respect of the first charge and two years in respect of the second charge, the sentences to run consecutively. Both the prosecution and the accused appealed against the judge's decision. The prosecution contended that the judge should have called for the accused's defence on the original first charge of trafficking, whereas the accused submitted that his conviction on both charges ought to be quashed. The interpretation to be given to s. 40 of the Act was also relevant to the present appeal because, during cross-examination of the prosecution witnesses, it was extracted from PW5 that the information that he had received was that another person was trafficking in drugs at the place in question. The judge, however, when he wrote his judgment held that the evidence given by PW5 about the contents of the information he had received was inadmissible because of s. 40 of the Act.

Held (dismissing the appeals, and affirming the convictions and sentences)

Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The prosecution, on the facts, had not on a maximum evaluation of its evidence at the close of its case established a *prima facie* case of trafficking. The evidence for the

A prosecution left in doubt the question whether the accused had indeed carried exh. P15 to his car with a view of driving off with the offending drugs. Accordingly, the judge was right in amending the first charge and in calling for the accused's defence on the amended charge. (para 6)

B

(1a) The facts and circumstances of the case when taken together reasonably supported the inference that it was the accused and no one else who was in possession of exh. P15 and its contents. Accordingly, the fact that the accused was C only momentarily in his car with the offending exhibits before his apprehension did not assist in repelling the *prima facie* inference of possession. Hence, there was no question of an acquittal at the close of the prosecution's case. (para 8)

D **(1b)** With regard to the accused's defence that he was unaware of the existence of exh. P15, the judge's finding that the accused was wanting in credibility ought to be accepted without reservation. It was a pure question of fact as to whether the accused had actual custody and control and E possession of exh. P15 and its contents, and the judge's finding of fact should not be disturbed. There was thus no ground on which it was open to the accused to complain that his defence was not properly evaluated. (paras 9 & 10)

(2) In respect of the admissibility of the information received by F PW5, the evidence in the present case was not at prejudicial to the accused, but in his favour. It went to show that another person might have been the true trafficker. Further, it was not hearsay when viewed from the point of view of the object for which the evidence was sought to be G admitted. The object of the defence was not to seek to establish the truth of the information received by PW5 but only the fact that he had received it. Hence, it was clearly admissible, and in the form in which it was received by PW5, it cast serious doubt on the critical question of H whether it was the accused who was the real trafficker. Put differently, it admitted of an inference in the accused's favour on the very issue the prosecution was seeking to establish at the close of its case. Section 40 of the Act did not preclude the admission of such evidence. *Alcontara Ambross Anthony v. PP* (dist). (para 14)

I

(2a) The judge's ruling that the substance of the information was inadmissible was made in breach of the rules of natural justice. The facts showed that no one, including the judge, objected to the evidence being adduced. The point was never raised and an opportunity was not given to counsel for the defence to submit on why the evidence was not inadmissible. It was therefore not open to the judge to make a ruling that clearly prejudiced the accused without affording him an opportunity to advance arguments on the point. (para 15)

(2b) The fundamental rule referred to by Lord Diplock in *Hadmore Productions v. Hamilton* was clearly breached in the instant case. However, having regard to the overwhelming evidence in the prosecution's favour on the amended charge of possession, there was no substantial miscarriage of justice to have been occasioned despite this serious misdirection on the judge's part. In short, the error by the judge had not prejudiced the accused in the final outcome of his case. (para 16)

(3) With regard to sentencing, the imposition of consecutive sentences in the present case was appropriate since the drugs were of a different nature from each other. *Mahdi Ibrahim Bamadhaj v. PP* (foll). (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Seorang yang bernama Ketua Inspektor Roslan Hussin ('PW5'), yang bertindak di atas maklumat yang diterimanya, mengetuai sebuah pasukan pegawai polis ke sebuah blok pangsapuri di Taman Miharja. Personel polis tersebut memposisi diri mereka dekat sebuah lot meletak kereta dan selepas kira-kira 30 minit, PW5 nampak tertuduh keluar dari blok pangsapuri tersebut. Tertuduh berjalan ke sebuah kereta, yang kemudiannya dibuktikan dimiliki olehnya, sambil membawa sebuah beg plastik merah ('eks. P15') dalam tangan kirinya. Beliau masuk ke dalam kereta dan pada masa itu juga, PW5 dan pasukannya memberkas tertuduh dan memeriksa keretanya. Mereka menjumpai eks. P15, dan juga jumpa dua paket di dalam eks. P15 yang mengandungi dadah berbahaya. Tertuduh seterusnya dituduh dan dibicara atas dua kesalahan: pertama, kerana mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'); dan kedua, kerana memiliki

A dadah berbahaya di bawah s. 12(2) Akta, yang boleh dihukum di bawah s. 39A(1) Akta. Pada penghujung kes pihak pendakwa, hakim perbicaraan memutuskan bahawa kes *prima facie* mengedar tidak dapat dibuktikan di atas tuduhan pertama. Beliau oleh yang demikian mengurangkan tuduhan pertama kepada tuduhan milikan
B dan memanggil tertuduh untuk membuat pembelaanya terhadap kedua-dua tuduhan. Pada penghujung kes keseluruhannya, tertuduh disabit dan dihukum kepada 13 tahun penjara ke atas tuduhan pertama dan dua tahun ke atas tuduhan kedua, hukuman-hukuman untuk berjalan secara berturutan. Kedua-dua pihak
C pendakwa dan tertuduh merayu menentang keputusan hakim. Pihak pendakwa berkata hakim sepatutnya memanggil pembelaan tertuduh di atas tuduhan asal mengedar dadah, manakala tertuduh mengadu bahawa sabitannya di atas kedua-dua tuduhan patut dibatalkan. Tafsiran yang perlu diberi kepada s. 40 Akta juga
D relevan kepada rayuan ini kerana, semasa periksa balas saksi-saksi pihak pendakwa, ia didapati dari PW5 bahawa maklumat yang beliau menerima ialah ada orang lain yang mengedar dadah di tempat tersebut. Hakim, walau bagaimanapun, apabila beliau menulis penghakimannya memutuskan bahawa keterangan yang
E diberi oleh PW5 mengenai kandungan maklumat yang diterimanya tidak boleh diterima disebabkan s. 40 Akta.

Diputuskan (menolak rayuan-rayuan, dan mengesahkan sabitan-sabitan dan hukuman-hukuman)

F **Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:**

(1) Pihak pendakwa, di atas fakta, tidak dapat di atas penilaian maksimum keterangannya pada penghujung kesnya membuktikan kes *prima facie* mengedar dadah. Keterangan
G pendakwa ragu-ragu lagi tentang soalan sama ada tertuduh memang membawa eks. P15 ke keretanya dengan niat untuk terus memandu pergi dengan dadah tersebut. Oleh yang demikian, hakim memang betul apabila meminda tuduhan pertama dan bila memanggil pembelaan tertuduh ke atas
H tuduhan yang dipinda.

(1a) Fakta-fakta dan halkeadaan kes ini apabila dipertimbangkan bersama dengan munasabah menyokong inferens bahawa tertuduh dan bukan orang lain yang memiliki eks. P15 dan
I kandungannya. Oleh yang demikian, fakta bahawa tertuduh

hanya seketika berada di dalam keretanya dengan eksibit-eksibit tersebut sebelum pemberkasannya tidak membantu menangkis inferens *prima facie* milikan. Oleh itu, tidak mungkin ada pembebasan pada penghujung kes pendakwa. A

(1b) Berkenaan dengan pembelaan tertuduh bahawa beliau tidak tahu tentang kewujudan eks. P15, dapatan hakim bahawa tertuduh tidak mempunyai kebolehpercayaan patut diterima tanpa kesangsian. Ia merupakan sesuatu soal fakta sama ada tertuduh mempunyai jagaan dan kawalan eks. P15 dan kandungannya sebenarnya, dan dapatan fakta hakim tidak seharusnya diggangu. Oleh itu tiada alasan untuk tertuduh mengadu bahawa pembelaannya tidak dipertimbangkan dengan betul. B C

(2) Berhubungan dengan kebolehterimaan maklumat yang diterima oleh PW5, keterangan dalam kes ini tidak memudaratkan tertuduh, tetapi menyokongnya. Ia menunjukkan bahawa orang lain mungkin ialah pengedar yang sebenar. Lagipun, ia bukan dengar cakap apabila dipandang dari sudut pandangan objek untuk mana keterangan diminta dibenarkan. Objek pembelaan bukan untuk mencuba membuktikan kebenaran maklumat yang diterima oleh PW5 tetapi hanya fakta bahawa beliau menerimanya. Oleh itu, ia jelas boleh diterima, dan dalam rupa ia diterima oleh PW5, ia menunjukkan keraguan serius ke atas soalan kritikal sama ada tertuduh ialah pengedar yang sebenar. Dalam kata lain, ia membenarkan sesuatu inferens yang menyokong tertuduh di atas isu yang pendakwa mencuba membuktikan pada penghujung kesnya. Seksyen 40 Akta tidak menghalang penerimaan keterangan sebegitu. *Alcontara Ambross Anthony v. PP* (dibezakan). D E F G

(2a) Perintah hakim bahawa isi maklumat tidak boleh diterima dibuat dengan melanggar rukun-rukun keadilan asasi. Fakta-fakta menunjukkan bahawa tidak seseorang pun, termasuk hakim, membantah keterangan dikemukakan. Perkara itu tidak pernah dibangkit dan peluang tidak diberi kepada kaunsel pembelaan untuk menghujah kenapa keterangan itu bukan tidak boleh diterima. Oleh itu, hakim tidak boleh membuat perintah yang jelas memudaratkan tertuduh tanpa memberikannya peluang untuk membuat hujahan mengenai perkara itu. H I

(2b) Rukun asasi yang dirujuk oleh Lord Diplock dalam *Hadmore Productions v. Hamilton* telah dilanggar dengan ketara di dalam kes ini. Walau bagaimanapun, memandangkan keterangan yang banyak sangat yang menyokong pendakwa di atas tuduhan milikan yang dipinda, tiada salah laksana keadilan penting yang telah terjadi sungguhpun hakim telah membuat salah arah yang serius. Pendeknya, kesilapan oleh hakim tidak memudaratkan tertuduh dalam hasil akhir kesnya.

(3) Berkenaan dengan hukuman, pengenaan hukuman-hukuman berturutan dalam kes ini adalah berpatutan kerana dadah-dadah tersebut mempunyai sifat berbeza di antara mereka. *Mahdi Ibrahim Bamadhaj v. PP* (diikuti).

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(dist)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Goi Ching Ang v. PP [1999] 1 MLJ 507 ***(refd)***
Hadmor Productions v. Hamilton [1983] 1 AC 191 ***(refd)***
Mahdi Ibrahim Bamadhaj v. PP [2003] 2 SLR 226 ***(foll)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Noor Mohamed v. The King [1949] AC 182 ***(refd)***
Sochima Okoye v. PP [1995] 3 CLJ 371 CA ***(refd)***
Subramaniam v. PP [1956] MLJ 220 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 2
Dangerous Drugs Act 1952, ss. 12(2), 37(d), 37A, 39A(1), 39B(1)(a), 40
Interpretation Acts 1948 and 1967, s. 66

(Criminal Appeal No: W-05-42-2006)
For the appellant - Gooi Soon Seng; M/s Gooi & Azura
For the respondent - Nurulhuda Nur'aini Mohd Noor DPP

(Criminal Appeal No: W-05-85-2003)
For the appellant - Nurulhuda Nur'aini Mohd Noor DPP
For the respondent - Gooi Soon Seng; M/s Gooi & Azura

[Appeal from High Court, Kuala Lumpur; Criminal Trial Nos: 45-52-2001 & 45-53-2001]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] There are two appeals before us this morning. One is by the prosecution. The other is by the accused. The background to these appeals is as follows.

[3] On 29 June 2001, at about 2.30pm PW5 (Chief Inspector Roslan bin Hussin) acting on information that he received, took a team of police officers to an apartment block at Taman Miharja. On arrival the police personnel took their position near a parking lot close to Lot 25 B 1, Condo Sri Miharja. After about 30 minutes had passed, PW5 saw a Chinese male, later identified as the accused, emerge from block 25 B 1. He saw the accused head towards a motorcar No. WFP 2429. According to PW5 and his fellow officer PW6 (Detective Sub-Inspector Teoh Soy Lim) the accused carried a red plastic bag (exh. P15) in his left hand. The accused then entered the car which was proven to belong to him. At this juncture, PW5 and his team went to the car, asked the accused to get out of it and identified themselves as police personnel. PW5 then administered to the accused the caution prescribed by s. 37A of the Dangerous Drugs Act 1952 ("the Act"). The accused remained silent. The car was searched. The police recovered a red plastic bag from the front passenger's seat. The bag was opened and from it was recovered a package wrapped in a Chinese newspaper (exh. P16) and a box containing something wrapped in a coloured wrapper (exh. P17). Subsequent chemical analysis of the material found in these two packages showed that exh. P16 contained 1000 pills of Methylenedioxymethamphetamine (exh. P19 and exh. P21) and exh. P17 contained 1000 pills of the same drug (exh. P23), a proscribed drug under the Act. The accused was later charged and tried for two offences: first, for trafficking in exh. P19 and P21 under s. 39B(1)(a) of the Act; second for being in possession of exh. P23 under s. 12(2), punishable under s. 39A(1) of the Act. At the close of the case for the prosecution the learned judge held that a *prima facie* case of trafficking had not been made out on the first charge. He accordingly reduced the first charge to one of possession and called upon the accused to make his defence to both charges. At the conclusion of the whole case, the accused

A was convicted and sentenced to 13 years imprisonment in respect of the first charge and two years in respect of the second charge, the sentences to run consecutively. The public prosecutor being dissatisfied with the reduction of the charge has appealed and asked that the judge's decision be reversed. The complaint is that
B the learned judge should have called for the accused's defence on the original first charge of trafficking. The accused also being dissatisfied with the learned judge's decision has appealed asking for his conviction to be quashed on both charges.

C **[4]** Before us a number of points were taken by both sides, most of which we find it unnecessary to deal with. In our judgment there are two issues which are germane to these appeals. The first is whether the prosecution had at the close of its case established a *prima facie* case of trafficking on the first
D charge. The second issue is whether at the close of the whole case the learned judge was correct in finding the accused guilty of possession of the drugs set out in both charges.

[5] Taking the first issue, the gist of the public prosecutor's case
E is that the learned judge failed to draw the proper inferences from the totality of the evidence led by the prosecution during its case. The learned deputy who argued the appeal submitted that had the learned judge properly appreciated the evidence of PW5 and PW6 he would have drawn the irresistible inference that the accused
F was trafficking in the drugs in question. These witnesses had seen the accused emerge from the building in question carrying exh. P15 which was found to contain drugs. He had placed it in his car and would have driven off but for the intervention of the police. These acts of the accused when taken together with the
G quantity of the drugs he was carrying warrants the drawing of an inference that he intended to convey the drugs in question to some person known or unknown. Hence, the elements of actual trafficking under s. 39B(1)(a) of the Act were *prima facie* established. So much for the prosecution's argument.

H **[6]** Now, it is clear from the record provided to us that the first occasion on which the suggestion was made, that the accused was carrying exh. P15 when he emerged from the apartment block in question was during PW5's testimony. This fact found no mention in the police report lodged by PW5 after the accused's arrest, a
I matter readily admitted by the witness. Neither did this fact find any mention in the opening statement made by the learned deputy

public prosecutor in the court below. If PW5 and PW6 had in their statements to the investigating officer mentioned the fact that each had seen the accused carrying exh. P15 at the material time it is reasonable to have expected the prosecution to state this as part of its case in its opening statement. Because, it is a fact of such critical importance to establish the element of trafficking. We are therefore satisfied for reasons different from those given by the learned judge that the prosecution had not on a maximum evaluation of its evidence at the close of its case established a *prima facie* case of trafficking. The evidence for the prosecution left in doubt the question whether the accused had indeed carried exh. P15 to his car with a view of driving off with the offending exhibits. Accordingly we are in agreement with the decision of the learned judge in amending the first charge and in calling for the defence of the accused on the amended charge.

[7] We are also unable to accept the submission of learned counsel for the accused that no case on any charge whatsoever had been made out by the prosecution at the close of its case. Learned counsel submitted that since there was a doubt as to whether the accused had carried exh. P15 to his car all that the prosecution was left with was the fact that the accused had entered his car and for a brief moment had been with exh. P15. This, it was said, was insufficient in itself to make out a case of possession.

[8] There are cases that have held that where drugs are found in a car the presumption under s. 37(d) of the Act cannot be invoked because a car is not "anything whatsoever containing any dangerous drug". See, *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132. We accept therefore that the prosecution cannot bring home the charge of possession by relying on the aforesaid presumption. But that said, it is open to the prosecution to rely on reasonable or fair inferences that may be drawn from undisputed facts to show that the accused did indeed have actual possession of exh. P15 and its contents. In the first place, there is the undisputed fact that the accused is the owner of the car in question. In the second place there is also no doubt that exh. P15 was found in his car. At the close of the prosecution case there were no inferences available in the accused's favour in relation to the issue of possession. In the ordinary course of events, nobody will put his or her things in another person's car. There was nothing in the prosecution's evidence to show that such a thing had happened. Indeed there was nothing in the

A evidence led by the prosecution to suggest that anyone other than the accused had access to his car or its use. These facts and circumstances when taken together reasonably support the inference that it was the accused and no else who was in possession of exh. P15 and its contents. Accordingly, the fact that
B the accused was only momentarily in his car with the offending exhibits before his apprehension does not assist in repelling the *prima facie* inference of possession. We are therefore satisfied that no question of an acquittal at the close of the prosecution's case arises.

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[9] The accused when giving evidence in his defence stated that he was unaware of the existence of exh. P15. According to him the following things happened. He was in an apartment in the building in question. That apartment belonged to Woo Kok Meng
D who together with one Goh Seng Hing, a Singaporean had borrowed the accused's car earlier on the day in question. Goh had later returned the car and handed the keys to the accused. It was only after this that the accused decided to go out. He took along with him a red plastic bag in which he carried a pair
E of ladies shoes. He went to his car, opened it and placed the bag on the floor behind the driver's seat. He had hardly turned around when he was accosted by the police. He did not notice exh. P15. He therefore had no knowledge of its contents.

F **[10]** Now, it is in evidence which was accepted by the learned judge that the police had searched the accused's car and found no other plastic bag apart from exh. P15. Based on the material before him the learned judge found the accused to be wanting in credibility. He was entirely within his province in making this
G finding. The fact that the accused had told a lie about the plastic bag with the ladies shoes in it must have caused grave doubt on his credibility. For our part we accept without any reservation the learned judge's finding on the credibility of the accused's evidence. It is a pure question of fact as to whether the accused had actual
H custody and control and possession of exh. P15 and its contents. In accordance with well-established principles we are not inclined to disturb the learned judge's findings of fact. See, *Andy Bagindah v. Public Prosecutor* [2000] 3 CLJ 289 CA. There is therefore no ground on which it is open to the accused to complain that his
I defence was not properly evaluated. In our judgment it was.

[11] Before we conclude there is one point which we must deal with. It is of considerable importance. It has to do with the interpretation of s. 40 of the Act which reads as follows:

> (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil, or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
>
> (2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
>
> (3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[12] The section is relevant to the present case in the following way. In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first

A determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be
B administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

[13] Nowhere during the course of the trial did the prosecution take any objection to the defence adducing evidence about the
C information received by PW5 implicating Woo Kok Meng. Neither did the judge at any time until the close of the defence advert to this. However, when he came to write his judgment he held that the evidence given by PW5 about the contents of the information he had received at the material time was inadmissible because of
D s. 40 of the Act. The learned deputy who argued this appeal has sought to support this finding. She relies on the decision of the Federal Court in *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 FC to do so. Now, in *Alcontara* what Edgar Joseph Jr FCJ said was this:

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> The penultimate point which arose for consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he has mounted the road block to stop and
> F search the car driven by the appellant; more particularly, he said this. 'I informed them [his men] that information had been received that a certain Indian would be traveling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from kawasan Permatang Bendahari towards Pulau Pinang.' Now, this statement by ASP Abdul Wahab was clearly based on
> G hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of
> H failure to object.
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> In *Vijayaratnam v. Public Prosecutor* [1962] 28 MLJ 106, M Hashim J had to consider a similar point, and went so far as to say (at p. 106 col 2D):

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> I think if possible, the expression "on information received" should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression "on information received", would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put it in another way, there was a probability that the court trying the appellant was, to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

Whilst we agree with much of what M Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Moreover, we must mention that in trials for any offence under the Act, sub-ss. (1) and (2) of s. 40 provide for special rules of evidence relating to the protection of informers – but note the exception provided for under sub-s. (3) of s. 40.

> Although the judge had not referred to that part of ASP Abdul Wahab's testimony, quoted above, the possibility that he was swayed by it could not be ruled out (see *Balasingham v. Public Prosecutor* [1959] MLJ 193 at p 194, col 2F to H, per Ismail Khan J (later CJ (Borneo)), and its effect might well have been to prejudice the case for the appellant.

[14] It would be noted at once that the evidence in *Alcontara* about the information received was seriously prejudicial to the accused in that case whilst carrying no probative value whatsoever. In accordance with settled principles such evidence is inadmissible. See, *Goi Ching Ang v. Public Prosecutor* [1999] 1 MLJ 507; *Noor Mohamed v. The King* [1949] AC 182. But the evidence in the present instance case is not at all prejudicial to the accused. It is in his favour. It goes to show that Woo Kok Meng may

have been the true trafficker. Further, unlike the statement in *Alcontara*, it is not hearsay when viewed from the point of view of the object for which the evidence was sought to be admitted. See, *Subramaniam v. Public Prosecutor* [1956] MLJ 220. The object of the defence was not to seek to establish the truth of the information received by PW5 but only the fact that he had received it. Hence it was clearly admissible. And in the form in which it was received by PW5 it cast serious doubt on the critical question whether it was the accused who was the real trafficker. Put differently, it admitted of an inference in the accused's favour on the very issue the prosecution was seeking to establish at the close of its case. In our judgment s. 40 does not preclude the admission of such evidence. All it prevents is the disclosure of the identity of the informant and any complaint. The word "complaint" is not defined by the Act. Nor is it defined by s. 66 of the Interpretation Acts 1948 & 1967 (Consolidated and Revised 1989) which is the applicable definition provision. However, the term "complaint" is defined by s. 2 of the Criminal Procedure Code as: "'complaint' means the allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence". But that definition applies only for the purposes of the Code and not to interpret other legislation such as the Act. Since the point was not fully argued we find it unnecessary to go into the question as to what "complaint" in s. 40 means. Suffice to say that the information received by PW5 is not a "complaint" on the facts of this case as it did not implicate the accused as happened in *Alcontara a/l Ambross Anthony v. Public Prosecutor*.

[15] There is another aspect to this part of the case which we must also mention. The learned judge's ruling that the substance of the information was inadmissible was made in breach of the rules of natural justice. As we observed a moment ago, none, including the judge, objected to the evidence being adduced. The point was never raised and an opportunity was not given to counsel for the defence to submit on why the evidence was not inadmissible. It was therefore not open to the learned judge to *suo moto* to make a ruling that clearly prejudiced the accused without affording him an opportunity to advance arguments on the point. We would in this context refer to the decision of the House of Lords in *Hadmor Productions v. Hamilton* [1983] 1 AC 191. In that

case, during arguments before the Court of Appeal, counsel had refrained from referring to speeches in Hansard for the purpose of interpreting the particular Act of Parliament. At no time during the course of hearing the appeal did Lord Denning MR who presided, indicate that he proposed to refer to Hansard. At the time that case was decided it was accepted that you could not have recourse to Hansard to interpret a statute. However, when he came to write his judgment the Master of the Rolls relied on Hansard. The House of Lords commented adversely on this. Lord Diplock said:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

[16] The fundamental rule referred to by Lord Diplock was clearly breached in the instance case. However, having regard to the overwhelming evidence in the prosecution's favour on the amended charge of possession we are unable to detect any substantial miscarriage of justice to have been occasioned despite this serious misdirection on the part of the learned judge. In short, the error by the learned judge has not prejudiced the accused in the final outcome of his case.

[17] For the reasons already given the appeals before us are without merit. They are dismissed. The orders made by the High Court in respect of conviction are affirmed. We will now hear arguments on sentence.

[18] Having heard submissions on the sentences, we find that the only point of any consequence is whether the learned judge was correct in directing the sentences on the two charges to run consecutively. Learned counsel for the accused has argued that since the drugs in question were recovered in the same transaction the learned judge ought to have directed the sentences to run concurrently. In answer, the learned deputy relying on *Mahdi bin Ibrahim Bamadhaj v. Public Prosecutor* [2003] 2 SLR 226 has argued that the imposition of consecutive sentences in the present case is appropriate since the drugs are of a different nature from each

A other. We are in agreement with the learned deputy. The authority cited by her clearly supports the methodology of sentencing adopted by the learned judge. We are therefore disinclined to disturb his order. The sentences of 13 years on the amended first charge and two years on the second charge as well
B as the sentences of whipping are affirmed.

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